No. 12,056

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE W. BOULTER and MARGRETTA L. BOULTER,

Appellants,

vs.

COMMERCIAL STANDARD INSURANCE COMPANY, a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

In our opening brief, page 14, we stated that the admissions in the pleadings, the evidence, and the stipulation of counsel establish *every fact alleged in the complaint.* The defendant in its brief at the outset appears to take issue with this statement, but ultimately tacitly concedes it by admitting that the answer to the question of upon whom rested the burden of proving that the tractor was not being used for transportation of merchandise purposes is determinative as to whether plaintiffs established a *prima facie* case. (Appellee's Br. p. 4.)

The question as to upon whom rested the burden of proving this point depends on whether or not the provisions of the policy relating thereto constitute a condition precedent or a condition subsequent, and can only be determined after considering all of the provisions in the policy and the endorsements attached thereto.

I.

UNDER THE TERMS OF THE POLICY THE USE OF THE VEHICLE WAS NOT A CONDITION PRECEDENT.

Before discussing the provisions of the policy that are applicable to this question, attention is directed to the rule relating thereto that was enunciated in the case of *Neilson v. American Mut. Liability Ins. Co.*, 111 N.J.L. 456, 168 A. 436. In that case the policy provided "that the Company would not be liable if the vehicle was used for any purpose other than that specified in the declarations contained in the policy".

> "Insurance contracts, as a rule, contain both affirmative and promissory warranties. The first class relates to matters existing at or before the issuance of the policy, and has the effect of a condition precedent; while a promissory warranty is one where the insured stipulates that something shall be done or omitted after the policy takes effect, and during its continuance, and has the effect of a condition subsequent. The provisions now under consideration must be construed as promissory warranties on the part of the insured, and in the nature of conditions subsequent,

a compliance with which is essential to the right of recovery under the contract."

See also:

Beatty v. Employers' Liability Assur. Corp., Supreme Court of Vt., 1933, 106 Vt. 65, 168 A. 919.

That there is a conflict in the decisions of various jurisdictions regarding what are conditions precedent and conditions subsequent is recognized in the case of *O'Morrow v. Borad,* 27 Cal. (2d) 794, 800 (167 P. (2d) 483).

Aside from the effect of the provisions of the endorsement attached to the policy that was prescribed by the Railroad Commission of the State of California, which is hereinafter discussed, those provisions of the policy that relate to this subject are as follows:

Under the title, **"Declarations"**, appears the following: "5. The Automobiles described are and will be used only for transportation of merchandise purposes and will be operated as follows, and this insurance covers for no other use or operation:" (Tr. p. 25.)

The insuring agreements contain the usual indemnity agreements, and on this subject state: "VI. **Policy Period, Territory, Purposes of Use.** This policy applies only to accidents which occur during the policy period, while the automobile is within the United States of America, and is owned, maintained and used for the purpose stated as applicable thereto in Statement 5 of the declarations." (Tr. p. 35.)

Immediately following, under the title, "**Exclusions**", it is provided: "This policy does not apply:" Then follows, among other things, certain uses of the automobile, such as using it for transportation of persons for consideration, renting, leasing, or hiring it, or towing a trailer not covered by like insurance in the company. (Tr. pages 35-36.)

Under the title, "**Conditions**", appears the following: "14. Declarations. By acceptance of this policy the named insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance." (Tr. p. 42.)

The defendant does not question the authoritative value of the cases which we cited holding that the burden is on the insurance company to prove facts which bring into operation an exception to general coverage or a condition subsequent. (Appellee's Br. p. 11.) It contends, however, on the same page that these cases are not applicable because here the only coverage provided is on a vehicle while "used only for transportation of merchandise purposes", and emphasizes that this declaration further provides that "this insurance covers for no other use or operation."

Apparently the defendant concedes that if the provision under consideration were in the policy under the title, "Exclusions", the provisions of which are

prefixed by the words, "This policy does not apply:", a different rule would then prevail. Without invoking at this point the fundamental rule of construction which favors the insured, the distinction that the defendant makes must rest upon the location in which the declarations appear in the policy or the connotation derived from the word, "declarations", as distinguished from the location and connotation of the word, "exclusions".

The purported exception from the operation of the policy under both titles is unambiguous and attains the same objective. Under the title, "Declarations", it is provided that the "insurance covers for no other use or operation", whereas under the title, "Exclusions", it is provided: "This policy does not apply:". Obviously under either clause the insurer escapes liability if the facts under either provision are established, subject only to the effect of the Railroad Commission endorsement.

"Stipulations in a contract are not construed as conditions precedent, unless that construction is made necessary by the terms of the contract." (*Deacon v. Blodget,* 111 Cal. 416, 418, 44 P. 159.) In considering conditions precedent generally, the Supreme Court of the State of California stated: "* * * it is well settled that such conditions are not favored by the law, and are to be strictly construed against one seeking to avail himself of them." (*Antonelle v. Lumber Co.,* 140 Cal. 309, 315, 73 P. 966.) In applying this doctrine to insurance contracts, the same court stated:

> " 'The rule of law is that policies are to be construed liberally in favor of the assured.' (*Wells, Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 411.) 'Any uncertainty or ambiguity in a contract of insurance is to be interpreted most strongly against the insurer.' (*Goorberg v. Western Assur. Co.*, 150 Cal. 515 (119 Am. St. Rep. 246, 11 Ann. Cas. 801, 10 L.R.A. (N.S.) 876, 89 Pac. 132).) *'Courts are disinclined to construe the stipulations of a contract as conditions precedent, unless compelled by the language of the contract plainly expressed. The reason for this disinclination is that such a construction prevents the court from dealing out justice to the parties according to the equities of the case.'* " (Italics added.)
>
> *Victoria S.S. Co. v. Western Assur. Co.*, 167 Cal. 348, 353, 139 P. 807.

Moreover, if the provisions under consideration are susceptible to the construction contended by plaintiffs, and likewise to the construction contended by defendant, they must be construed strictly as against the insurer.

> "This for two reasons: (1) Because it is found in a policy of insurance (Civ. Code, sec. 1654; *Maryland Casualty Co. v. Industrial Acc. Com.*, 178 Cal. 491, 494 (173 Pac. 993); *Wells Fargo & Co. v. Pacific Ins. Co.*, 44 Cal. 397); and (2) because the language in question is found in an exception, attached to the policy, which purports to limit the risk assumed by the insurer in the general provisions thereof. (*Berliner v. Travel-*

ers' Ins. Co., 121 Cal. 458 (66 Am. St. Rep. 49, 41 L.R.A. 467, 53 Pac. 918).)"

Mah See v. North American Acc. Ins. Co., 190 Cal. 421, 424-5, 213 P. 42.

Defendant cites a number of cases of other jurisdictions holding that where the policy limits the automobile to a particular use, this constitutes a condition precedent and imposes upon the plaintiffs the burden of proving that the use of the automobile at the time of the accident was one contemplated by the policy. We have not contended that the nature of the use could not be a condition precedent if appropriate language to this effect were used and it was susceptible to no other conclusion.

In determining who has the burden of proof, the rules adopted by the courts of California are controlling.

"The question of where the burden of proof lies is one of substantive law, as to which the local rule must be observed. (Citing cases.)"

New York Life Ins. Co. v. Rogers, C.C.A. 9th, 1942, 126 F. (2d) 784, 788.

Defendant cites the cases of *Allen v. Home Ins. Co.,* 133 Cal. 29 (65 P. 138), and *Arnold v. American Ins. Co.,* 148 Cal. 660 (84 P. 182), as supporting its contention. These cases merely hold that the provisions there under consideration were conditions precedent, and it was so concluded in the subsequent case of *Jones v. International Indemnity Co.,* 39 Cal. App. 706 (179 P. 692), wherein the court, in referring to those cases, stated:

> "In the cases cited the complaints showed that there were certain conditions precedent, the performance of which was not alleged."

Elsewhere in this brief we point out that the provision, "will be used only for transportation of merchandise purposes", is modified by the Railroad Commission endorsement, in that this endorsement has the effect of making the defendant liable for accidents occurring while the insured was performing any function incidental to the operations of a motor carrier. We there show that the statutory definition of the operations of such carrier is much broader than the restriction in the declaration relied upon by defendant. When the provisions of the declaration are construed with the provisions of the endorsement, it becomes apparent that the former could not be a condition precedent even if the policy had so expressly provided; this for the obvious reason that the declaration is void to the extent that it purports to restrict the coverage of the policy and throw upon persons injured by the insured a greater burden than contemplated by the statutes to which the endorsement relates.

II.

THE JUDGMENT IS ERRONEOUS EVEN THOUGH THE COURT WERE TO HOLD THAT THE DECLARATION WAS A CONDITION PRECEDENT AND THAT THE PLAINTIFFS HAD THE BURDEN OF PROVING IT.

Assuming without conceding that the defendant's contentions are correct to the effect that the provi-

sions in the declarations were conditions precedent and that plaintiffs had the burden of proving that at the time of the accident the vehicle was being used for the purposes contemplated by the provisions of the policy, the same result would ensue. It is not to be overlooked that this is an appeal from a judgment in favor of the defendant notwithstanding a verdict of a jury in favor of the plaintiffs. The burden of proof is satisfied by actual proof of the facts of which proof is necessary, *regardless of which party introduces the evidence.* (*Aetna Ins. Co. v. Taylor,* 86 F. (2d) 225.) In *Estate of Burns,* 26 Cal. App. (2d) 741, 80 P. (2d) 77, the court, in discussing the power of the court to grant a nonsuit, stated:

> "The expression, 'disregarding conflicting evidence', obviously means to disregard only the fact that there is a conflict in the evidence and give full credit only to that portion of the evidence, *whether produced by plaintiff or defendant,* which tends to support the allegations contained in plaintiff's complaint." (Italics added.)
>
> (Pages 743-4.)

It is contended by defendant that the court committed prejudicial error in denying its motion for dismissal at the time that plaintiffs rested their case. If it be assumed that the denying of this motion was erroneous, it was, nevertheless, not prejudicial.

> "The denial of a motion for a nonsuit is not prejudicial error where facts sufficient to support the judgment are in evidence either before or after the denial of the motion. (*Crosby v. Cline,* 186 Cal. 698 (200 Pac. 801).) Whether or not

> denial of this motion was prejudicial error must depend upon our conclusions as to whether there was sufficient evidence to sustain the judgment."
>
> *Parra v. Cleaver,* 110 Cal. App. 168, 170, 294 P. 6.

See also:

Peters v. Southern Pacific Co., 160 Cal. 48, 52-53, 116 P. 400;

Huston v. Schohr, 63 Cal. App. (2d) 267, 272-3, 146 P. (2d) 730.

In so far as the complaint is concerned, the allegation in paragraph II (Tr. p. 2) that Warner and Woodrow were at all times on the 22nd day of June, 1946 (the day of the accident), engaged in transporting property for hire as a business over public highways in the State of California by means of motor vehicles is sufficient to meet the objection of defendant. The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved, and a generalized summary of the case that affords fair notice is all that is required. (*Securities and Exchange Commission v. Time Trust, Inc.,* D.C. Cal. 1939, 28 F. Supp. 34.)

Furthermore, any deficiency in the complaint relating to this point was cured by the answer of the defendant, which in great detail sets forth the provisions of the declaration and the alleged failure of its insured to comply with its provisions. (Tr. pp. 11-13.)

"While allegations of the performance of conditions precedent are essential to the statement of a cause of action upon a policy of insurance (*Allen v. Home Ins. Co.,* 133 Cal. 29 (65 Pac. 138); *Arnold v. American Ins. Co.,* 148 Cal. 660 (25 L.R.A. (N.S.) 6, 84 Pac. 182)), here appellant by its answer alleged that neither the plaintiff nor the insured had performed the terms and conditions of the policy, thus treating the issue as properly made, and curing the defect."

Zimmerman v. Continental Life Ins. Co., 99 Cal. App. 723, 725-7, 279 P. 464.

In support of its contention that there is no evidence that the vehicle was being used for transportation of merchandise purposes, the defendant, in discussing the testimony of Warner, chooses to conclude that it would only sustain a finding that he was driving 250 miles to pay a premium on an insurance policy, and to consummate a wholly unresolved secret intent to communicate with a prospective customer about future hauling operations. (Appellee's Br., p. 15.)

No reference is made to the wildcatting operations of the insured, nor to the fact that regardless of his intent he was actually returning to his point of origin after having delivered property for compensation. This point was fully covered in our opening brief, and we at this time only call attention to the additional case of *Davis v. California Highway Indem. Exch.,* 118 Cal. App. 403 (5 P. (2d) 447). In that case the policy provided that the vehicle was to be used for "auto tours". A real estate concern contracted with

the insured to furnish the automobile with a driver to bring passengers to a sightseeing bus. For this purpose the plaintiff became a passenger of the automobile, and when she arrived at the location from which the bus was to start it was decided that on account of unfavorable weather the trip would be abandoned. Upon returning the plaintiff to her home the accident occurred.

> "These being the principal evidentiary facts in relation to the stated issue, appellant now contends that the evidence conclusively shows that the car was not being used in 'auto tours', but that plaintiff was merely a passenger in the ordinary sense of one who is a passenger in an automobile for hire. Wherefore it is argued that the court erred in finding that at the time of said accident said automobile was being used for auto tours and was covered by the indemnity policy. It may be conceded that at the time of the accident the automobile was being used under a contract hiring it for the stated purpose; but the evidence justified the court in finding further that said automobile under said contract of hiring was being used for touring purposes, and that under the arrangement made with the plaintiff her trip or tour of the day was to begin when she left her home and end when she was returned thereto."
>
> 118 Cal. App. 403, 406-7, 5 P. (2d) 447.

Furthermore, even if it be assumed that the return to the point of origin to pay the insurance premium on the policy in question constituted a use of the vehicle not covered by the policy, this fact would not

in itself preclude plaintiffs from recovering, as the jury had the right to conclude from the evidence that Warner was also doing other acts within the purview of his customary operations as a carrier of property.

> " 'If there is at the same time both an authorized and unauthorized use, the policy protects for liability arising from the latter as much as from the former use.' "
>
> *Johnson v. National Casualty Co.*, Court of Appeals, La. (1937), 176 So. 235.

This same doctrine has been followed in California.

> "It has been held that when two causes join in causing an injury, one of which is insured against, the insured is covered by the policy. * * *"
>
> *Zimmerman v. Continental Life Ins. Co.*, 99 Cal. App. 723, 726, 279 P. 464.

III.

THE DETERMINATIVE QUESTION IS NOT WHETHER THE INSURED WAS AT THE TIME OF THE ACCIDENT TRANSPORTING MERCHANDISE, BUT WHETHER HE WAS PERFORMING ANY OPERATIONS OF A MOTOR CARRIER.

The defendant places considerable reliance upon the case of *Foster v. Commercial Standard Ins. Co.*, 121 F. (2d) 117. Nothing in that case is in conflict with the position we have assumed here, in that there the "damage admittedly was incurred while the insured was operating the truck for pleasure and outside the coverage of the policy." (page 120). It is note-

worthy that although in that case the policy had the same declaration as is here involved, namely that the truck "would be used only for transportation of merchandise purposes", the court, nevertheless, extended this provision under the corporation commissioner's endorsement to the *operations of a contract carrier.*

> "The policy did not include coverage for loss from operations other than those of a *contract carrier,* nor did the permit require such coverage. * * * Plaintiff was not liable to respondent in damages for the loss suffered by defendants while the truck was being operated *other than in the business of assured as a common carrier.*" (Page 120.) (Italics added.)

The endorsement required by the Railroad Commission and attached to the policy here involved provides:

> "The policy to which this endorsement is attached is an Automobile Bodily Injury Liability and Property Damage Liability policy, and is hereby amended to assure compliance by the insured, as a *motor carrier of property,* with appropriate provisions of law (Highway Carriers' Act, Statutes 1935, Chapter 223, as amended; City Carrier's Act, Statutes 1935, Chapter 312, as amended; and Public Utilities Act, Statutes 1915, Chapter 91, amended); and with the pertinent rules, orders, and regulations of the Railroad Commission of the State of California.
>
> "* * * that the right of any person, firm or corporation to recover under the policy shall not be affected by any act, omission, or misrepresentation of the insured or his employees with regard

to any warranty, condition, declaration, or provision of the policy; and that the policy shall remain in full force and effect notwithstanding such act, omission or misrepresentation or the violation of any warranty, condition, declaration or provision of the policy by the insured or his employees; Provided, However, that this endorsement shall not be construed to impose any obligation on the Company for which it would not be liable independently hereof with respect to * * * (4) any loss arising out of any operations of the insured except operations authorized or for which authorization is required under the aforesaid statutes. * * *

"The Company further agrees that this endorsement shall prevail over any conflicting provision in the policy. * * *" (Italics added.)

(Tr. pp. 89-91.)

In the body of the policy itself it is provided: "Any specific statutory provision in force in the State in which this policy is issued shall supersede any condition of this policy inconsistent therewith." (Tr. p. 41.)

"'This policy having been issued for the express purpose of enabling the Johnson Company to comply with this statute, as the rider upon the policy shows, the provisions of the statute enter into, and become part of, the policy, and such statutory provisions override and supersede anything in the policy repugnant to such provisions."

Liberty Mut. Ins. Co. v. McDonald, 97 F. (2d) 497, 498.

Hence, in order to sustain the judgment notwithstanding the verdict in the instant case, it was not necessary for the jury to have determined whether or not the vehicle was being used for the transportation of merchandise at the time of the accident, *but whether it was being used for any operation of a motor carrier of property as defined by law and the specific statutes mentioned in the endorsement.*

The Highway Carriers' Act, Deering's California General Laws, Act 5129a (Sec. 1, subd. (f)), defines a highway carrier as every person "whatsoever engaged in transportation of property for compensation or hire as a business over any public highway in this state by means of a motor vehicle or motor vehicles."

Under the provisions of the Public Utilities Act "The term 'transportation of property', when used in this act, *includes every service in connection with or incidental to the transportation of property* * * *" (italics added). (Deering's General Laws, Act 6386, Sec. 2, subd. (f).)

The activities of the insured also fall into the definition of a common carrier. "Everyone who *offers* to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry." (Italics added.) (*Civil Code,* Sec. 2168.)

In *Landis v. Railroad Commission,* 220 Cal. 470, 31 P. (2d) 345, the Supreme Court of California accepted a definition of a common carrier as stated in the case of *Sanger v. Lukens,* 24 F. (2d) 226.

"'One who, by virtue of his calling and as a regular business, undertakes to transport persons or commodities from place to place, offering his services to such as may choose to employ him and pay his charges.' This definition is particularly applicable to the petitioner Landis under the evidence. Within the limits of his equipment he holds himself out to haul what he offers to carry to those who may choose to employ him and pay charges satisfactory to him."

(Page 474.)

In *Sanger v. Lukens,* supra, the court further stated:

"It then being clear that, when plaintiff undertakes for hire to transport upon the public highways of the state property for all who choose to employ him, he engages in the business of carrying and delivering commodities as a public employment, and is making the highways his place of business by using them as a common carrier." (Page 229.)

See also:

People v. Duntley, 217 Cal. 150, 163, 17 P. (2d) 715.

With these rules and definitions in mind, can it be seriously contended that the finding of the jury that Warner was using the vehicle in the performance of an operation of a motor carrier is "so lacking in evidentiary support that an appellate court would be impelled to reverse it upon appeal." *Umsted v. Scofield Eng. Const. Co.,* 203 Cal. 224, 228, 263 P. 799. As previously pointed out, the fact that the insured may

also have been engaged in activities outside of those of a motor carrier is not determinative of the question.

Defendant has not contended that the "wildcatting" operations of its insured were not within the purview of the policy nor of the statutes applicable thereto. Hence, the question as to whether the insured was performing an operation of a motor carrier at the time of the accident must turn upon a consideration of what were his customary practices and activities in wildcatting. In its brief the defendant quotes testimony that it considers favorable to its contentions, and ignores the rule that upon an appeal from a judgment entered notwithstanding a verdict of a jury to the contrary, conflicting testimony and inferences must be ignored, and it is the duty of the court to consider only testimony and inferences that may be legally drawn therefrom which tend to support the verdict of the jury.

Aside from the fact that he was returning to his point of origin after delivering a cargo for compensation, Warner testified: that in wildcatting he has no definite over-the-road operation of his own, so he subhauls for big contractors (Tr. p. 103); that he does not always start from San Francisco, but may start from any place where he happens to be where he can locate a job (Tr. p. 129); that it was his intention to get a load out of Eureka for San Francisco, but at that time there was nothing coming out of that particular territory (Tr. p. 107); that while he was in the Willow Creek area he solicited business (Tr. pp.

112-113); that he intended if possible to haul barrels out of Willow Creek (Tr. p. 124); that at the time of the accident he was not on his vacation, and that one of his purposes in returning to San Francisco was to discuss with one Dowdell the hauling of a load (Tr. p. 127); that at the time of the accident he was on the most direct route to Dowdell's place of business in San Jose (Tr. p. 138); that it is customary in wildcatting to leave his trailer to be unloaded while he does something else (Tr. p. 129); that in wildcatting it is common practice to take a trailer that is already loaded instead of his own trailer, and that Dowdell has such trailers (Tr. p. 139); that there was nothing peculiar about his trip from Eureka to San Francisco, which was tied up with his intention to haul fruit for Dowdell, as fruit started to move at about that time of year (Tr. p. 167); that he had done a good deal of work with Dowdell in the past and had worked for him regularly (Tr. p. 166); and that although he intended to communicate with Dowdell he did not because the accident disabled his tractor. (Tr. pp. 139-140.)

This testimony clearly supports the implied finding of the jury that at the time of the accident Warner was wildcatting, and, consequently, performing an operation of a motor carrier.

In *Wood v. Vona,* 68 N. E. (2d) 80, a tractor was likewise involved in an accident, and it occurred while the tractor, after being repaired, was being driven to a place to get the trailer, and thence to go to a

place to resume hauling. The statutes of Ohio and the endorsement on the policy of that case are very similar to those here involved.

> "Section 614-115, General Code makes it clearly apparent that the General Assembly intended to protect the public from loss or damage due to the operation of motor vehicles when operating under a permit granted by the Public Utilities Commission.
>
> "If that purpose is to be attained, the policy must be given a broad and liberal interpretation in favor of the insured and those claiming under or through such insured."
>
> (Page 83.)

In that case, as in this, the endorsement provided:

> " 'No condition, provision, stipulation, or limitation contained in the policy or any endorsement thereon, nor the violation of any of the same by the insured shall affect in any way the right of any person injured in person or property, within the state of Ohio, by negligence of the insured, *while* operating as aforesaid, or relieve the insurance company from the liability provided for in this endorsement or from the payment to such person of any judgment within the limits set forth in the policy, but the conditions, provisions, stipulations, or limitations contained in the policy or in any other endorsement thereon shall remain in full force and be binding as between the insured and the insurance company.' * * *
>
> "Ocean insists that the policy covers the vehicles only while actually engaged in hauling. That contention was considered and repudiated

by this court in a unanimous decision in the Mitchell case, supra. * * *

"Applying the legal principle announced in the Mitchell case to the situation here presented, to wit, that the collision and damage occurred while the tractor, after being repaired, was being driven to a place to get the trailer and thence to the plant of Glenn Cartage to resume hauling for it, the conclusion is inescapable that during any or all parts of that operation the equipment was within the coverage of the policy. That is unmistakably true unless we were willing to recede from the position established by the Mitchell case. In the instant case the movement was in the transportation service within the meaning of the policy, although such vehicle was not then being operated for the transportation of freight."

(Pages 84-85.)

See also:

Mitchell v. Great Eastern Stages, Inc., 140 Ohio St. 137, 42 N.E. (2d) 771.

IV.

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTIONS.

In its title VII on page 27 of its brief, defendant contends that the trial court committed error in denying certain motions. We will answer these contentions in the order presented.

(a) The denial of defendant's motion for dismissal at the conclusion of plaintiffs' case was not error.

This contention is in effect merely a reiteration of the contention made by defendant that the burden of proving the exception in the declaration was upon plaintiffs, and has been fully covered elsewhere in this brief. In any event, if the denial of this motion was error, it was not prejudicial error. (*Parra v. Cleaver,* supra; *Peters v. Southern Pacific Co.,* supra; *Huston v. Schohr,* supra.)

(b) The denial of defendant's motion to set aside the order striking the plea of res adjudicata was not error.

Under this title the defendant advocates the adoption by this court of an anomalous rule. The plaintiffs commenced their action for damages against Warner and Woodrow in the state court on August 8, 1946, these persons were defended by attorneys hired by the defendant, and judgment was recovered in favor of plaintiffs on September 16, 1947. (Tr. p. 5.) The answer shows that during the pendency of the state court action and on October 18, 1946, defendant filed a complaint for declaratory relief in the Federal court against its insured, Warner and Woodrow, and against these plaintiffs. (Tr. pp. 13-14.)

In that action the defendant's insured were being sued by the same attorneys who were at the same time defending them in the pending state court action (Tr. pp. 15, 171). The defendant took judgment against Warner by default on August 14, 1947 (Tr. p. 15). In the state court action the plaintiffs herein recovered

judgment against Warner and Woodrow on September 16, 1947 (Tr. p. 5). On October 27, 1947, the defendant obtained a default judgment against its insured, Woodrow (Tr. p. 17).

It is not alleged nor contended that either of the plaintiffs herein was subject to the jurisdiction of the Federal court or served with process or that either appeared in the declaratory relief action therein. The defendant, nevertheless, contends that these plaintiffs are bound by the judgment. The facts concerning this action for declaratory judgment and the law applicable thereto are discussed by Judge Yankwich in the notes to the text of his opinion (Tr. pp. 67-68).

There may be added, however, reference to Rule 19 (b) of the Federal Rules of Civil Procedure.

> "(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; *but the judgment rendered*

> *therein does not affect the rights or liabilities of absent persons.*" (Italics added.)

In Restatement of the Law of Judgments, Section 79, page 357, the rule is thus stated:

> "If a person is named as a party to the action but he is neither named nor otherwise described in the judgment, he is not a party to the judgment and is not affected by the decision of issues leading to it. * * * Conversely, if a person is not served and jurisdiction over him is not otherwise acquired and he does not appear or intervene in the action, the judgment is void as to him although his name appears therein."

The defendant calls attention to a letter sent to Warner and Woodrow by the writer as attorney for plaintiffs in the state court action, the sole purpose of which was to prevail upon Warner and Woodrow to defend the action for declaratory relief so as to avoid the possibility of the contention that the defendant now makes. The conduct of the defendant and its attorneys in suing its insured and clients while at the same time defending them in another action can best be described by references to the language used by the Supreme Court of Vermont in *Beatty v. Employers' Liability Assur. Corp.,* 106 Vt. 65, 168 A. 919.

> "That no man can serve two masters is as true today as it was when the words were first spoken. A lawyer, retained by an insurance company to defend a case on behalf of a policy holder, as long as he remains in the case, owes his complete and

entire fidelity to the person whom he represents. He cannot substitute the interests of the insurer for those of the insured, and the company that employs him cannot be heard to claim that the insured is not prejudiced when he pursues so reprehensible a course of conduct."

See also:

O'Morrow v. Borad, 27 Cal. (2d) 794, 798, 167 P. (2d) 483.

The fact that the writer, as attorney for the plaintiffs in the state court action, had knowledge of the pendency of the action for declaratory relief does not bind the plaintiffs in this action.

"A person is a stranger, even though he has knowledge of the suit, if, although he has a right to intervene therein, he is under no obligation to do so, and he does not by actual intervention bring himself within its binding effect."

50 *C. J. S.* 384.

(c) The denial of defendant's motion for a new trial conditioned on a reversal is not error.

This contention merits no reply, as it is elementary that the granting or refusing of a new trial is a matter resting in the sound discretion of the district judge, whose action in such respect is not reviewable for errors of fact except in the most exceptional circumstances. (*Aetna Casualty & Surety Co. v. Yeatts,* 122 F. (2d) 350; *Youdan v. Majestic Hotel Management Corp.,* 125 F. (2d) 15.)

CONCLUSION.

It is respectfully submitted that the judgment notwithstanding the verdict be reversed, with directions to the trial court to enter judgment on the verdict of the jury.

Dated, Berkeley, California,
February 25, 1949.

Respectfully submitted,
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